The report of the Senior Government Chemist which was put in was also in my view inadmissible for the reason that he was called as a witness and no notice was given under section 427 of the Criminal Procedure Code of the prosecution's intention to use the report. I do not atttach much importance to this point, because I have no doubt that if he had been properly examined his evidence would have been identical with the contents of his report. Technically, however, it is wrong for a witness in a criminal case to produce a report as a substitute for oral evidence. Clearly, if the witness is in the witness box the best evidence is his oral evidence as to what he saw or discovered (see section 60 of the Evidence Ordinance). Where witnesses of this kind are brought to Court their reports should only be used, if at all, either to refresh memory or as corroboration.

Another ground of appeal related to the two passengers in the Complainant's car who were offered for cross-examination and not cross-examined. In his Grounds of Decision one of the reasons given by the learned Magistrate for believing the Complainant's evidence was as follows :—

"Rozells gave evidence that he was carrying 5 passengers, Prosecution Witness No. 7 Chin Boon Chew and Lim Hoon Ling in his car. Chin Boon Chew and Lim Hoon Ling were offered by the prosecution for cross-examination. As they were not cross-examined by the Defence, I presumed that their evidence would be unfavourable to Defendant."

Whilst it might be possible in the High Court, after a Preliminary Enquiry, to draw some inference from the failure of the accused to cross-examine a witness whose deposition contained evidence against him I do not think it is possible to draw any such inference in a summary trial. It seems to me that no inference can be drawn from Counsel's failure to cross-examine a witness who has given no evidence and whose statement he has never seen. The learned Deputy Public Prosecutor conceded that the learned Magistrate should not have drawn any such inference in the present case.

One of the authorities cited by Counsel for the appellant in support of this appeal was *Girdari Lall & Ors. v. Public Prosecutor*[3]. That was a robbery case in which a photograph of the accused mounted on a card which was obviously part of a Police record was put in evidence and it was held that this was prejudicial to the accused. In the judgment of the Court this passage appears :—

"The production of the photograph in the present case would be apt to prejudice a jury and to embarrass a Judge, and where evidence pro and con of robbery is fairly evenly balanced, may easily have the effect of tipping the scale."

I feel that in the present case, where there was at least a slight conflict of evidence between the Complainant and his passenger, and the evidence pro and con of negligence amounting to an offence appears to have fairly evenly balanced, the admission of the inadmissible report of the doctor as to intoxication and the improper inference drawn that the other two passengers would have given evidence unfavourable to the accused may well have tipped the scale against the appellant in the mind of the learned Magistrate.

For these reasons I do not think that the conviction should stand and I quash it accordingly.

Conviction quashed.

ARIFFIN BIN CASSIM JAYNE v. PUBLIC PROSECUTOR.

[A. Cr. J. (Thomson, J.) April 30, 1953]

[Ipoh — Criminal Appeal No. 4 of 1953]

Criminal Procedure Code (Cap. 6), s. 316 — Plea of autrefois acquit — Effect of setting aside conviction of lower Court.

This was an appeal against the conviction of the appellant on a retrial on a charge of criminal breach of trust. The principal ground of appeal was that the appellant was entitled to the benefit of the plea of **autrefois acquit** on the ground that his original conviction had been set aside.

Held: where an appellate Court in an appeal from a conviction reverses the conviction it should either acquit or discharge the accused or it should order a retrial by a competent Court and if it fails to follow either of these courses and if there is no question of the trial in the Court a **quo** being a nullity, then the order setting aside the conviction must be held to be an acquittal.

[**Editorial Note:** — In **Public Prosecutor v. Suppiah Pather** (Penang Criminal Revision No. 14 of 1951 unreported) Spenser Wilkinson, J. said that it has frequently been reiterated that unless there is some very good ground to the contrary the discharge of an accused person should amount to an acquittal. In this connection his Lordship referred to the following decisions: (1) **Public Prosecutor v. Mat Zain bin Yahya** digested in (1949) M.L.J. 148; (2) **Goh Oon Keow & anor. v. Rex** (1949) M.L.J. 35 and (3) **Seet Ah Ann v. Public Prosecutor** (1950) M.L.J. 293.

His Lordship varying the Magistrate's Order by directing that the discharge in his case amounted to an acquittal concluded:—

"If the prosecution are not ready to proceed with their case after reasonable adjournments have been granted, an accused person should not be allowed to suffer from the dilatoriness of the prosecution by being left with a charge hanging over his head indefinitely.

"Where the prosecution are unable to proceed for the time being owing to the difficulty of obtaining a witness or for some other cause and are able to satisfy the Court that they will proceed with the prosecution within a reasonable time, then there would be good grounds for a discharge not amounting to an acquittal. In this case, however, although counsel apparently only asked for a discharge not amounting to an acquittal I think the proper order would have been a discharge amounting to an acquittal."]

Cases referred to :—

(1) *R. v. Lawson* (1952) 1 T.L.R. 889.

(2) *R. v. Barron* 10 Cr. App. R. 81.

(3) *Crane v. Director of Public Prosecutions* (1921) 2 A.C. 299.

(4) *R. v. Heyes* (1950) 2 All E.R. 587.

(5) *Chinna Similan v. Peria Similan* (1933) M.W.N. 224.

(6) *Liakat Hossein v. Emperor* (1907), 12 C.W.N. 246.

(7) *Narayanaswami Vanniar v. Karumbayiram Periyari* (1935) I.L.R. Mad. 256.

(8) *Emperor v. Miajan* (1926) I.L.R. Cal. 192.

CRIMINAL APPEAL.

K. C. Chan for the appellant.

M. G. Neal (Federal Counsel) for the respondent.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

Thomson, J. : —The appellant in this case was convicted in the Sessions Court at Ipoh of criminal breach of trust, in contravention of section 408 of the Penal Code, and sentenced to eighteen months simple imprisonment. Against that conviction and sentence he has now appealed.

The proceedings against the appellant have followed a singularly confused course, and in order to appreciate the question in issue in the present appeal it will be desirable to set them out at some length.

From 14th January, 1946, until 2nd June, 1949, the appellant, an accountant practising in Ipoh, was secretary of an undertaking known as the Gajah Transport Co. Ltd., a limited liability company incorporated under the Companies Ordinance. As such he performed the usual duties of a company secretary but was apparently in no way concerned with the actual operation of the Company's transport undertaking which was in the hands of a managing director who received the Company's operating revenue and out of it defrayed as far as was possible the Company's operating expenses. The accused received only payments made by shareholders in respect of their shares and from time to time defrayed the office expenses of the Company and made lump sum payments to the managing director. The organisation of the Company on its business side was of a somewhat primitive nature, there would seem to have been numerous failures to comply with the provisions of the Companies Ordinance, and, perhaps not unnaturally, it was found in due course to be in financial difficulties. In the event, an inspector, a chartered accountant named Niblock, was appointed to examine its affairs and on 2nd June, 1949, the appellant ceased to be secretary.

It is not necessary to set out at length the findings contained in Mr. Niblock's long and exhaustive report, none of which have at any time been seriously challenged, but from it the following salient facts clearly emerge :—

(1) During the period 14th January, 1946, to 13th January, 1947, the amount of money received by the appellant less expenditure accounted for by him amounted to $8,068.

(2) During the period 14th January, 1947, to 13th January, 1948, the amount of money received by the appellant less expenditure accounted for by him amounted to $5,397.

(3) During the period 14th January, 1948, to 13th January, 1949, the amount of money received by the appellant less expenditure accounted for by him amounted to $3,843.

(4) During the period 14th January, 1949 to 2nd June, 1949, the amount of money received by the appellant amounted to $570 while the expenditure accounted for by him amounted to $2,842.

(5) As a corollary to the foregoing facts, during the whole period of three and a half years from 14th January, 1946 to 2nd June, 1949, the amount of money received by the appellant exceeded the expenditure accounted for by him by $15,036 which sum therefore ought to have been held by him on behalf of the Company on the latter date, that is, 2nd June, 1949.

On 2nd June, 1949, the appellant was not in possession of that sum of $15,036 nor was he able to account for it and in the event it was decided to prosecute him. His trial took place in the Sessions Court in June, 1951. At the commencement of it he was faced with seven charges, four of criminal breach of trust in contravention of section 408 of the Penal Code and three of offences in contravention of section 111(4) of the Companies Ordinance to all of which he claimed trial.

It is not necessary here to consider the charges under the Companies Ordinance. It is, however, necessary to consider separately the charges of criminal breach of trust and this can most conveniently be done in the light of those portions of Niblock's report which have been mentioned. These charges may be summarised as follows :—

(1) "Between 14th January, 1946, and 13th January, 1947," criminal breach of trust of $8,068, that is the excess of income over expenditure during the period in question of which the appellant should have been in possession on 13th January, 1947. For convenience I will call this "the 1946 charge".

(2) "Between 14th January, 1947, and 13th January, 1948," criminal breach of trust of $13,465, that figure being arrived at by adding together the excess of income over expenditure during the period in question and the amount of $8,068 which formed the subject matter of the 1946 charge and being the amount of which the appellant should have been in possession on 13th January, 1948. I will call this "the 1947 charge".

(3) "Between 14th January, 1948, and 13th January, 1949," criminal breach of trust of $17,308, that figure being arrived at by adding together the excess of income over expenditure during the period in question which was $3,843 and the sum of $13,465 which formed the subject matter of the 1947 charge. I will call this "the 1948 charge".

(4) "Between 14th January, 1949, and 2nd June, 1949," criminal breach of trust of $15,036, that sum being arrived at by taking the sum which formed the subject matter of the 1948 charge and subtracting from it the excess of expenditure over income during the period in question. I will call this "the 1949 charge".

I pause here to make two observations regarding these charges.

The first is that in truth and in fact they were alternative charges, for example, the appellant could only be convicted on the 1949 charge on the basis that on 14th January, 1949, he was in possession of $17,308 of the Company's money, that is to say on the basis that he had not embezzled a single cent during the periods covered by the other three charges.

The second is that what was alleged in each of them was a single act of conversion. The essence of criminal breach of trust is not failing to account or anything of the sort. It is the actual fraudulent conversion by the trustee of his principal's money. To allege more than one act of conversion in a single charge would make that charge bad for duplicity. What was alleged in each charge was a single act of conversion of the sum mentioned (or a part of it) on a day unknown between the dates mentioned in the charge (see *R. v. Lawson*[1]) and it is necessary to emphasise the point because in my opinion a certain failure to appreciate it may be responsible for an element of confusion of thought that would appear to have affected consideration of the case at certain stages.

To proceed, the learned President (Whimster) after hearing some argument as to the charges decided to proceed with the trial on the 1949 charge only. In the event, on 4th July, 1951, the appellant was convicted on that charge. All the other charges, that is to say, the three criminal breach of trust charges and the three Companies Ordinance charges were withdrawn under section 171 of the Criminal Procedure Code, the withdrawal amounting to an acquittal.

In his Grounds of Judgment the learned President after reviewing the evidence at length observed :—

"It is impossible to say at what particular dates specific acts of breach of trust occurred but I think the correct view is that the breach of trust was complete only at the 2nd June, 1949, the date when the accused relinquished office as Secretary."

This was not a happy way of putting the point. The essence of criminal breach of trust is conversion and conversion is not a continuing process. If a servant converts $100 of his employer's money on Monday another $100 on Tuesday and another $100 on Wednesday there is not a single conversion of $300 which is only complete on Wednesday, there are three separate acts of conversion. It is true that the servant might be charged in such circumstances with converting $300 on a day unknown between Sunday and Thursday and that if the Court was satisfied that on some date in the period alleged he had converted some at least of the money in question he might properly be convicted accordingly. But that is a very different thing from saying that a conversion of $300 was "complete" at the end of the period charged.

I am not here concerned with the merits of the conviction of 4th July but it is important in view of the subsequent course of the matter to make it clear that whatever the learned President said in his Grounds of Judgment the conviction necessarily implied and could only be supported by a finding of fact that on some specific (though not necessarily specified) date between 14th January, 1949, and 2nd June, 1949, the appellant converted $15,036 or some specific (though not necessarily specified) part of that amount.

Against the conviction of 4th July the appellant appealed and on 12th December, 1951, the appeal came on for hearing before Hill, J. His Lordship, in a judgment of considerable profundity, pointed out that "the offence of criminal breach of trust is committed the moment there is misappropriation" and went on to observe that the learned President :—

"was mistaken in his view that the breach of trust was complete only when accused relinquished office as Secretary.

What in fact happened in the lower Court was that the Appellant was convicted and sentenced on a charge concerning the period 14th January, 1949, to 2nd June, 1949, of criminal breach of trust during the period 14th January, 1946, to 13th January, 1949."

Such a conviction, His Lordship said, could not stand and he had no alternative but to allow the appeal and quash the conviction and sentence. He then proceeded to order (in accordance with section 171 (ii) of the Criminal Procedure Code) that the appellant be re-tried not on the 1949 charge on which he had quashed the conviction but on the three charges of criminal breach of trust that had been withdrawn, that is to say, the 1946, 1947 and 1948 charges and that the trial on the first of these charges be taken first.

There has been considerable argument as to the effect of this judgment of Hill, J., with which I shall deal shortly. In the event, however, and in purported pursuance of that judgment the appellant was again brought before the Sessions Court presided over by

another President (Garton). On that occasion, however, the appellant was faced not with one or all of the breach of trust charges which had previously been withdrawn, but with a new charge which read as follows:—

"That you having been entrusted as Clerk, to wit. Secretary, with the sum of $42,640.00 the property of the Gajah Transport Co. Ltd. at Ipoh, between the 14th day of January, 1946 and the 2nd day of June, 1949, did fail to account for the sum of $15,036.35 on or about the 2nd day of June, 1949, at Ipoh, and thereby committed criminal breach of trust of the said money, an offence punishable under Section 408 of the Penal Code".

This course was strenuously opposed by Counsel for the appellant on the ground that the terms of the order of Hill, J., as to the charges on which the appellant should be retried was mandatory, and he went on to argue that if the new charge was allowed to stand, the appellant was entitled to plead in accordance with section 302 of the Criminal Procedure Code that he had been previously acquitted.

The learned President decided both these points in favour of the prosecution. He proceeded with the trial of the appellant on the new charge, convicted him and sentenced him to eighteen months simple imprisonment. It is with the appellant's appeal against that conviction and sentence that I am now dealing.

I am not concerned to criticise the wording of the new charge. It is of course defective in that it confuses the failure to account which was one of the *facta probantia* (if indeed it was not the only *factum probans*) with the conversion which was the *factum probandum*. As, however, the learned President does not seem to have been led astray by this unfortunate wording it cannot be said to have occasioned any miscarriage of justice.

Nor am I disposed to agree, and indeed the point has not been argued before me, that the judgment of Hill, J., was mandatory in the sense that it precluded the appellant being put on his trial on any legally available amendment of the three withdrawn charges of breach of trust as they stood at the time of the appeal.

But what does call for careful consideration is whether in the circumstances of the case and once he was faced with the new charge the appellant was entitled to the benefit of the plea of *autrefois acquit*. That is the only ground of the present appeal with which I find it necessary to deal.

The original conviction of the appellant was for the conversion of a sum of money between 14th January, 1949, and 2nd June, 1949. That conviction was set aside on the ground that if the money had been converted at all it was converted prior to 14th January, 1949. In my opinion, for reasons which I shall state shortly, the effect of that decision of the appellate Court was in law an effective bar to any prosecution of the appellant for converting the money in question on any date subsequent to 13th January, 1949. It would not have been a bar to his prosecution for converting the money on a date unknown prior to 14th January, 1949, and in law there could have been no objection to such a charge although I fully appreciate that on the evidence it would in practice have been impossible to obtain a conviction upon it. That however, is beside the point. A competent Court had decided on the merits that there had been no conversion after 13th January, 1949 and that was the end of the matter.

It has been argued that because appellate Courts in India and in Malaya possess wider powers of ordering a re-trial than are possessed by the Court of Criminal Appeal in England and because of the wording of section 316 of the Criminal Procedure Code (which is the same as section 423 of the Indian Code), there is some substantive difference between our law and the law of England as to the effect of an order setting aside a conviction. To my mind this proposition cannot be supported in principle and derives no support from any authority.

In England the setting aside of a conviction by the Court of Criminal Appeal is tantamount to an acquittal for the purpose of a plea of *autrefois acquit* (see *Rex v. Barron*[2] but where the original trial has been a nullity the Court has power in its discretion to order a re-trial or *venire de novo* (see *Crane v. Director of Public Prosecutions*[3]; *R. v. Heyes*[4]). "If this were not so", said Lord Atkinson (*Crane supra* at p. 330) "this absurd result would follow — that in the case of a mistrial, which is actually no trial at all, the Court of Criminal Appeal would be obliged when they annulled the conviction in such a case as this to direct an acquittal of the accused, though they at the same time decided that he had never been tried at all".

I can find no authority for the proposition that the law here or in India is in any material way different except in the case where an appellate Court exercises its statutory power to order a re-trial. It is true that by section 316 of the Criminal Procedure Code an appellate Court if in an appeal from conviction it reverses the conviction should follow one of two

courses, either it should acquit or discharge the accused or it should order re-trial by a competent Court. But if it fails to follow either of these courses and if there is no question of the trial in the Court *a quo* being a nullity then the order setting aside the conviction must be held to be an acquittal. This was held in India by Burn, J., in the Madras case of *Chinna Similan v. Peria Similan*[5] and although His Lordship gave no reasons for so holding I have no hesitation in adopting a decision which appears to be so clearly supported by common-sense and the demands of justice and convenience alike as expressed in the old maxim *nemo debet bis vexari pro una et eadem causa* which, after all, represents no more than the application of the doctrine of *res judicata* to criminal proceedings.

The position as I have thus stated it is in no way watered down by the consideration that when the conviction in the Lower Court has been set aside on the ground that the trial in the event of which it was had was a nullity then the absence of an order in terms for a re-trial is no bar to the accused person being tried again. This is clear from the Indian cases of *Liakat Hossein v. The Emperor*[6] where a conviction was quashed on the ground that the Magistrate in question had no jurisdiction to try the case, of *Narayanaswami Vanniar v. Karumbayiram Periyari*[7] which was another case where the Magistrate appealed against had no jurisdiction and *The Emperor v. Miajan*[8] which was a case where the conviction was set aside for want of compliance with the provisions of the Code relating to the recording of evidence. In all these cases the original trial was a nullity, in none of them accordingly had the accused person been in peril and so in none of them was the setting aside of the earlier proceedings a bar to a valid trial at a later stage.

In the circumstances I have no option but to quash the conviction with which I am here concerned. On the charge as framed it cannot stand for to that charge in its existing terms *autrefois acquit* is a complete answer and it would be a waste of time to consider whether it could have been had on any amended charge. To avoid the objection to the existing charge an amended charge would have had to allege that the conversion took place some time prior to 14th January, 1949, and so far as I have been able to advise myself there is no evidence to support any act of conversion before that date. That there may be no suggestion that I am sinning against my own light, forensically speaking, I will make a formal order acquitting the accused on the charge as it stands.

Before departing from the case I would only add that I see nothing in section 171 of the Code to prevent the Sessions Court proceeding now with the original charges against the accused under the Companies Ordinance.

Conviction quashed.